93-12

Supreme Court, U.S.
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No.___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JACK B. RACKLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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JACK B. RACKLEY

June, 1992

68 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit -- in conflict with the decision of the United States Court of Appeals for the Fifth Circuit's decision in United States v. Christo, 614 F.2d 486 (5th Cir. 1980) -- wrongly determine that no prejudicial error occurred depriving Petitioner of his Fifth Amendment due process rights to a fair trial when the government was permitted to cross-examine Petitioner and one of his witnesses regarding civil proceedings which led to their "lifetime bans from banking" by the Comptroller of the Currency? Along these same lines, did the court erroneously determine that cross-examination on this point did not violate applicable Federal Rules of Evidence, specifically Rules 404(b) and 611(b)?

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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on March 8, 1993, and its subsequent Judgment denying Petitioner's Petition for Rehearing, entered on March 31, 1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 986 F.2d 1357 (10th Cir. 1993), and is included herewith as Appendix "A". Further, the Judgment of the Tenth Circuit entered on March 31, 1993, in response to Petitioner's Petition for Rehearing is included herewith as Appendix "B".

JURISDICTION

The jurisdiction of this Court is respectfully invoked pursuant to the authority of Title 28, § 1254(1) of the United States Code. The opinion of the United States Court of Appeals for the Tenth Circuit was filed on March 8, 1993. The Court's Judgment denying Petitioner's Petition for Rehearing was entered on March 31, 1993. Therefore, the time in which to file this Petition for Writ of Certiorari extends until June 29, 1993. The Petition for Writ of Certiorari was filed by that date.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 404(b) provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in

order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Federal Rule of Evidence 611(b) provides:

"Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

STATEMENT OF THE CASE

Jack B. Rackley petitions this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

This Petition raises one substantial issue:

Did the United States Court of Appeals for the Tenth Circuit -- in conflict with the decision of the United States Court of Appeals for the Fifth Circuit's decision in United States v. Christo, 614 F.2d 486 (5th Cir. 1980) -- wrongly determine that no prejudicial error occurred depriving Petitioner of his Fifth Amendment due process rights to a fair trial when the government was permitted to cross-examine Petitioner and one of his witnesses regarding civil proceedings which led to their "lifetime bans from banking" by the Comptroller of the Currency? Along these same lines, did the court erroneously determine that cross-examination on this point did not violate applicable Federal Rules of Evidence, specifically Rules 404(b) and 611(b)?

Petitioner submits that in this case he was denied his due process rights under the Fifth Amendment to a fair and impartial trial when the government was allowed over repeated objections to cross-examine him and defense witness Larry Baresel at length regarding the fact that they had been "banned from banking" for life by the Comptroller of the Currency. This impermissible cross-examination severely prejudiced Petitioner because the government was able to imply misleadingly that the ban from banking -- which occurred in the context of a consent decree to civil proceedings initiated by the Comptroller -- was directly related to the criminal charges and was evidence or an indication of guilt on the criminal charges faced by Mr. Rackley. In fact, the consent decree which led to the "ban from banking" dealt with facts totally unrelated to the criminal charges. The United States Court of Appeals for the Tenth Circuit, in finding that no error occurred, decided this case in conflict with the United States Court of Appeals for the Fifth Circuit's opinion in United States v. Christo, 614 F.2d 486 (5th Cir. 1980), and also misapplied Federal Rules of Evidence 404(b) and 611(b).

The Petitioner, Jack Butler Rackley, was indicted with Mark Hight in and eighteen count indictment in the United States District Court for the Western District of Oklahoma with bank fraud and misapplication of bank funds on April 17, 1991. The alleged offenses were committed before the enactment of the Federal Sentencing Guidelines. Before trial, Hight pleaded guilty and was sentenced to one and one-half (1 1/2) years imprisonment. Hight testified against Petitioner at trial.

Petitioner was tried by a jury before the Honorable Lee West, United States District Judge, from July 8-12, 1991. The jury found Petitioner guilty of counts 3, 4, 5, 6, 9, 11, 12, 13, 14, 15 and 16. Petitioner was acquitted of counts 1, 2, 7, 8, 10, 17, and 18.

Petitioner was not sentenced under the Federal Sentencing Guidelines since the alleged acts occurred before November 1, 1987. He was sentenced to two and one-half (2 1/2) years on each of counts 5, 13 and 15, and two and one half (2 1/2) years on each of counts 3, 4, 6, 9, 11, 12, 14 and 16. The sentences were to run concurrently, and Petitioner was ordered to pay a $50.00 special assessment fee on each count for a total of $550.00.

The Petitioner timely filed his appeal with the United States Court of Appeals for the Tenth Circuit, as an appeal of right from entry of judgment, pursuant to Federal Rules of Appellate Procedure 4(b), Title 18 §3742(a) and Title 28, §1291 of the United States Code. In part, this appeal addressed an abuse of discretion by the trial court in permitting the government to cross-examine Petitioner and his witness Larry Baresel on the "lifetime ban" from banking. The panel issued the opinion on March 8, 1993, rejecting this argument. The opinion is attached hereto as Appendix "A".

Petitioner then filed his Petition for Rehearing with the Tenth Circuit. On March 31, 1993, the court entered Judgment denying the Petition for Rehearing on the merits. This Judgment is attached hereto as Appendix "B".

The circumstances surrounding the question presented for consideration here, as they developed in the trial court, are as follows.

Petitioner Jack B. Rackley and witness Larry Baresel had previously been involved in civil administrative proceedings with the comptroller of the Currency, and as a result of said proceedings, agreed in settlement of said proceedings to pay certain fines and further agreed to a ban from banking, which could be modified at any time.

Petitioner asserted that no only did the Government inquire of the defendant's removal from banking, but also inquired into the same area with the witness Larry Baresel, who had likewise entered into a settlement with the Comptroller of the Currency. It should be noted that the action taken by the Comptroller of the Currency had absolutely nothing to do with the facts involved in the Indictment.

After direct-examination of Baresel, Petitioner's attorney approached the Bench and again moved for the court to not allow the evidence of the life-time ban or problems with the Comptroller of the Currency by Baresel or Rackley.

> "Mr. Gile: Your Honor, I anticipate that there may be question on cross-examination about some problems that he had with the Comptroller of the Currency that goes to that motion in limine. Before we get into that, I want to approach the bench."
>
> . . .
>
> "Mr. Gile: Yes. I would move and renew the motion in limine that the Government has in its possession some documents from the Comptroller of the Currency where Mr. Hudson and Mr. Rackley and Mr. Baresel received, and basically through an agreed consent order from the Comptroller of the Currency, a lifetime ban on banking."...
>
> "So what I am trying to avoid; number one, the prejudicial effect of it. I think it

would outweigh the probative value, plus the fact that it opens another door, another defense that I am going to have to combat in some manner if that comes out (Tr. 651-658)

The Government argued they were entitled to prove that loan policies were violated and that the witness Baresel had been banned from banking and that the banks were in trouble and "were given certain directives" that were tantamount to almost a cease and desist order and told they had to take corrective action (Tr. 654)

The Court inquired why witness Baresel was removed and was told:

"Mr. Matthews: Because of his improper role and because of the ---because of the fraudulent nature of the transactions that he was involved in, Your Honor.
The Court: In none of these transactions?
Mr. Matthews: No..."

The Court allowed inquiry over Petitioner's objection but "without going into the details" (Tr. 659-660).

The first question asked Mr. Baresel on cross-examination is as follows:

"By Mr. Matthews:

Q. Mr. Baresel, on January 14, 1989, were you served with a notice of intention to remove from banking by the office of

the Comptroller of the Currency?"

A. Approximately then, yes.

...

"Q. As a result of this intention to remove from banking, have you been barred from banking for life?" (Tr. 660)

Although Baresel asserted that his actions were an agreement and compromise with the Comptroller, and that he could return to banking, the prejudicial effect was overwhelming.

Likewise, the government over Petitioner's objection, inquired of Rackley into the same area regarding a ban from banking and the problems with the Comptroller of the Currency. Mr. Williams approached the questioning somewhat differently than Mr. Matthews. Mr. Williams inquired: "Sir, your career in banking didn't end so well, did it?" However, Mr. Williams did not stop there, he inquired further whether or not a notice had been served on Mr. Hudson (John Hudson owner of the banks involved) (Tr. 791)

Said evidence was elicited at the end of the government's cross-examination and Petitioner objected to the line of inquiry and moved for a mistrial (Tr. 793-794)

Petitioner argued on appeal that under United States v. Christo, 614 F.2d 486 (5th Cir. 1980) and Federal Rule of Evidence 404(b) cross-examination on this issue deprived him of a fair trial by falsely suggesting that the ban from banking was related to the charged offenses and that references to the ban from banking in the unrelated civil proceedings constituted not only

impermissible other crimes evidence, but was wrongly used by the government as a means to suggest guilt on the criminal charges. It is on the ground that Petitioner's Fifth Amendment rights to a fair trial were violated that Petitioner respectfully submits his cause to the Court.

REASONS FOR GRANTING THE WRIT

The convictions of Petitioner were obtained in direct violation of the due process clause of the Fifth Amendment. These violations occurred due to the government's repeated attempt during trial to prejudice the jury by introduction of Petitioner's consensual agreement of civil sanctions by the Comptroller of the Currency in an unrelated case.

The opinion from the United States Court of Appeals for the Tenth Circuit is also in conflict with the holding in United States v. Christo, 614 F.2d 486 (5th Cir. 1980), a conflict which should be resolved by this Court.

QUESTION

Did the United States Court of Appeals for the Tenth Circuit -- in conflict with the decision of the United States Court of Appeals for the Fifth Circuit's decision in United States v. Christo, 614 F.2d 486 (5th Cir. 1980) -- wrongly determine that no prejudicial error occurred depriving Petitioner of his Fifth Amendment due process rights to a fair trial when the government was permitted to cross-examine Petitioner and one of his witnesses regarding civil proceedings which led to their "lifetime bans from banking" by the Comptroller of the Currency? Along these same lines, did the court erroneously determine that cross-examination on this point did not violate applicable Federal Rules of Evidence, specifically Rules 404(b) and 611(b)?

In its opinion, the court stated that cross-examination of defense witness Baresel and Petitioner regarding the fact that they had been banned from banking for life by the Office of the Comptroller of the Currency did not constitute inadmissible and prejudicial other crimes evidence under Rule 404(b) of the Fed.R. Evid.; was in effect invited by the defense because both Baresel and Appellant testified to their experience in the banking business and that the loans were made responsibly and in compliance with applicable federal regulations; and that, to this extent, the inquiry on the ban from banking was appropriate under Fed.R.Evid. 611(b) because this fact undermined the credibility of Baresel's and Rackley's assertions that the loans were proper under federal regulations.

First, the court below overlooked or misconstrued authority demonstrating that cross-examination on the lifetime bans from banking imposed on Baresel and Petitioner constituted prejudicial evidence of other crimes or bad acts not admissible under any exception listed in Fed.R.Evid. 404(b). As the court noted in its opinion, evidence of other crimes or bad acts is "inadmissible to prove character in order to show conformity therewith ..."

The effect of the questioning on the lifetime bans from banking had the precise impact not merely of "impeaching" the witnesses testimony, but suggesting directly and misleadingly that the bans from banking were predicated on misdeeds, bad acts or crimes related to the charges in the indictment. The clear inference the government sought to leave with the jury was that because Baresel and Mr. Rackley had been banned from banking, this was somehow evidence of guilt on Petitioner's part. The cross-examination was particularly prejudicial because the bans

from banking had nothing to do with the specific acts charged in the indictment. That it was the intent to suggest that the ban from banking was evidence of guilt is evident from the trial transcript. The prosecutor's questioning of Petitioner tied the ban from banking directly to loans made in 1986 and 1987, during the period of time the acts alleged in the indictment occurred. This was the final subject covered on cross examination.

> Q. Sir, your career in banking didn't end so well, did it?
>
> A. Ended?
>
> Q. Well --
>
> Mr. Gile: Could we approach the bench?
>
> Mr. Williams: Your Honor, I think we have already discussed this.
>
> The Court: Ask your next question.
>
> Q. (By Mr. Williams) Did there come a time, sir, when you were served with a notice of intent to remove you from banking?
>
> A. Yes, sir.
>
> Q. The same type of notice that was served on Mr. Hudson?
>
> A. Yes, sir.
>
> Q. And that notice of intent to remove you from

banking involved conduct on your part while you were president of the Tipton Bank and while you were on the board of directors at Hammon Bank, did it not?

A. Yes, sir.

Q. The conduct involved loans that you made and approved between December 1986 and February 1987?

A. Ah -- (pause) -- that is not totally correct, no, sir.

Q. Well, tell us what is, sir?

A. The loans that I believe you are referencing were actual loans that had been sent to the bank by Mr. Hudson.

Q. But --

A. Some of them I had initialed as president of the bank in Tipton, yes.

Q. You were acting on behalf of Mr. Hudson, were you not?

Mr. Gile: May I approach the bench?

Mr. Williams: I have one remaining question.

The Court: Sure. Ask the question and don't answer yet.

Q. (By Mr. Williams) As a result of this notice of intent to remove you from banking, sir, you agreed not to participate in the affairs of any bank; is that correct?

The Court: You may answer.

A. Only with the approval of the appropriate regulatory agency, yes, sir.

(Tr. 790-92)

The cross-examination of Baresel was similar. The ban from banking was the first subject matter explored on cross-examination.

Q. Mr. Baresel, on January 14, 1989, were you served with a notice of intention to remove from banking by the office of the Comptroller of the Currency?

A. Approximately then, yes.

Q. Did this notice of intention to remove from office as director involve your transactions at Hammon Bank and Tipton Bank?

A. Yes, it did.

Q. These are banks that you testified to that you were the director?

A. Yes, sir.

Q. Did this involve conduct to which you were involved in December of 1986 and February of 1987?

A. The original complaint or the discussion or what?

Q. The conduct for which the complaint was based on.

A. I don't recall the exact dates. It was while I was a director.

Q. Does the December 1986 time frame and the February 1987 time frame ring a bell?

A. I apologize, I don't recall that, because we didn't discuss that very much. We talked about the whole tenure.

Q. As a result of this intention to remove from banking, have you been barred from banking for life?

A. No. I agreed with the Comptroller of the Currency that prior to entering into any other national banking system, I would get their prior written consent. I did that in the Fall of 1990.

Q. So as a result of this removal action, you are now required to obtain the prior approval of the office of the Comptroller of the Currency?

A. Sure, I agree, yeah.

(Tr. 660-61)

Because the issues in the indictment were distinct from the acts which led to the ban from banking by the Comptroller of the Currency, and because the bans were the result of consent orders and mutually agreed to settlements, Baresel's and Petitioner's testimony regarding the soundness of these particular loans could not be relevantly impeached with the fact that they had been banned from banking. (Tr. 659-660). Testimony regarding loans and bank procedures unrelated to the action by the Comptroller of the Currency could thus not have "opened the door" to this line of questioning.

Thus, the cross-examination was no more than an attempt to imply that Petitioner was guilty of the acts charged in the indictment because he had been previously banned from banking. On this point, United States v. Biswell, 700 F.2d 1310 (10th Cir. 1983), another Tenth Circuit case, was instructive. In Biswell, it was held that government cross-examination which raised the specter of other crimes or bad acts was prejudicial under Fed.R.Evid. 404(b) constituted reversible error and was not invited by direct examination. Thus, the cross-examination of Baresel and Appellant should be analyzed under this rule of evidence. As with the other crimes evidence in Biswell, the bans from banking were not "relevant to one or more issues in the case." United States v. Biswell, 700 F.2d at 1317. There was thus not a "clear and logical connection between the alleged earlier offense or misconduct and the case being tried." Id. at 1317-18.

Reference to the civil action taken by the Comptroller of the Currency is similar to the action that was condemned by the Tenth Circuit in the recent cases of United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991) and United States v. Brown, 943 F.2d 1246 (10th Cir. 1991), where convictions for conspiracy,

bankruptcy fraud, and mail fraud were reversed because the government introduced prejudicial evidence consisting of a bankruptcy court opinion finding that the defendants engaged in a conspiracy.

The Tenth Circuit held that the cross examination was permissible under Fed.R.Evid. 611(b) as a means to attack Baresel's and Petitioner's credibility because "both witnesses in their direct testimony testified regarding their care and expertise in following banking rules and regulations ..." thus making the lifetime ban from banking "... probative as to the credibility of the witnesses' testimony." Again, Baresel and Petitioner should have been impeached with questions specific to the acts alleged in the indictment; because the ban from banking was unrelated to those acts, this was not relevant impeachment.

Furthermore, the Tenth Circuit's opinion overlooked argument and authority demonstrating that Fed.R.Evid. 404(b) and 611 have to be read together, since they deal in this instance with evidence of collateral matters. The right to cross-examination and Fed.R.Evid. 611 does not justify inquiry into collateral, prejudicial subject matter. The acts which led to the bans from banking were not explored on direct examination and were unrelated to the acts charged in the indictment. Cross examination under Fed.R.Evid. 611 must be predicated on evidence which is otherwise admissible. United States v. Reed, 700 F.2d 638 (11th Cir. 1983). This explosively prejudicial evidence was not otherwise admissible, and could not have been admitted in the government's case in chief under either Fed.R.Evid. 403 or 404(b). See particularly, United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991); United States v. Brown, 943 F.2d 1246 (10th Cir. 1991).

Petitioner submits that the Tenth Circuit misinterpreted the holding of United States v. Christo, 614 F.2d 486 (5th Cir. 1980),

and that the Fifth Circuit's holding in Christo is in conflict with the decision in Petitioner's case. The Tenth Circuit held that Christo does not apply to Petitioner's case because in Christo, the record was replete with confusion between evidence and instructions regarding the defendant's civil regulatory violations and the "felony charges of misapplication of bank funds for which defendant was on trial." The court below states that the linkage between the civil violations and the criminal charges was so pervasive that the jury was led to believe that evidence of the civil violations was evidence of guilt on the criminal charges.

Rather, the holding in Christo parallels the situation in Petitioner's case. At page 494-95 of Christo, the court stated:

> During the trial, the government repeatedly attempted to introduce certain Cease and Desist Orders issued by the Comptroller of the Currency against BNBT. Defense objections based on irrelevance and prejudice were generally sustained. However, the jury heard the government prosecutor refer to or solicit questions concerning the Cease and Desist Order no less than eight different times.
>
> ...
>
> We cannot condone this sort of trial tactic nor do we feel that the trial court's instruction adequately cured the impact on the jury. Standing alone, the prejudicial effect of these orders on the jury would require reversal. (emphasis ours)

Relying on United States v. Stefan, 784 F.2d 1093, 1098 (11th Cir. 1986), the court below stated that Christo was

inapplicable because evidence of the ban from banking was introduced "... for purposes other than to show criminal misapplication..." and because references to the bans from banking were brief, nonspecific, and were made only for impeachment, not to suggest that this was evidence of criminal violations.

This analysis was misplaced. The confrontational and accusatory manner in which this evidence was injected into the record and the fact that the government did not make clear that the bans from banking were unrelated to the acts charged in the indictment could easily lead the jury to believe the bans from banking were indeed related to the acts charged and were evidence of guilt, notwithstanding the unstated purpose -- impeachment of credibility -- for which they were supposedly offered. The references to the ban from banking, tied to the dates covered by the indictment, were not brief, as the above quoted passages from the transcript reveal. The cross-examination on this subject matter, which was entirely misleading, was prejudicial in the same fashion as the evidence of civil regulatory violations found to be error in Christo. See also, United States v. Jakeway, 783 F.Supp. 590 (M.D. Fla. 1992); United States v. Wolf, 820 F.2d 1499 (9th Cir. 1987). Because the jury could have inferred that the bans from banking could be used as evidence of guilt, United States v. Stefan, 784 F.2d 1093 (11th Cir. 1986) did not defeat Petitioner's argument. By exploring evidence of the ban from banking, the government wrongly invited the jury to infer that because Baresel and Petitioner were banned from banking and thus did not follow accepted banking practices, Petitioner intended to injure and defraud the bank and was thus guilty of the acts charged in the indictment. The Tenth Circuit's opinion in Petitioner's case and the Fifth Circuit's opinion in Christo, on these facts, are irreconcilable.

CONCLUSION

WHEREFORE, Petitioner requests that this Honorable Court grant the Petition for Writ of Certiorari for the reasons set forth herein.

Respectfully submitted,

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ATTORNEY FOR PETITIONER
JACK BUTLER RACKLEY

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were served on the required parties by placing the same in the United States Mail with postage fully prepaid, this 28 day of June, 1993.

Sara Criscitelli
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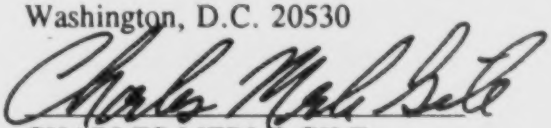
Office of the Solicitor General
United States Department of Justice
Washington, D.C. 20530



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APPENDICES

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 91-6343
	)	
JACK B. RACKLEY,	)	
	)	
Defendant-Appellant,	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CR-91-73-W)

C. Merle Gile, Oklahoma City, Oklahoma, for Defendant/Appellant.

Sara Criscitelli, Department of Justice, Washington, D.C., (Wayne P. Williams and Kevin G. Matthews, Attorneys for the Department of Justice, Washington, D.C., and Timothy D. Leonard, U.S. Attorney, Oklahoma City, Oklahoma,with her on the brief) for Plaintiff-Appellee.

Before BALDOCK and EBEL, Circuit Judges, and LUNGSTRUM, District Judge.*

LUNGSTRUM, District Judge.

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* The Honorable John W. Lungstrum, United States District Judge for the District of Kansas, sitting by designation.

On April 17, 1991, defendant Jack B. Rackley and Mark E. Hight were charged in an eighteen-count Indictment by a grand jury in the Western District of Oklahoma. The Indictment charged defendant and Night with thirteen counts of bank fraud in violation of 18 U.S.C. §1344 and five counts of misapplication of bank funds in violation of 18 U.S.C. §656. Both defendant and Hight were named in all eighteen counts of the Indictment. On June 11, 1991, Hight filed a petition to enter a plea of guilty.

Defendant's jury trial was conducted on July 8-12, 1991. Hight testified as a government witness at defendant's trial. Defendant was convicted of eight counts of bank fraud, in violation of 18 U.S.C. §1344, and three counts of misapplication of bank funds, in violation of 18 U.S.C. §656.[1] Defendant was sentenced to concurrent terms of two and one half years imprisonment on each count.

Defendant contends on appeal that the district court erred: (1) in finding that the government presented sufficient evidence to convict defendant on the charges of bank fraud and misapplication of funds; and (2) that the district court erred in allowing the government to cross-examine defendant and defense witness Larry Baresal regarding their removal from banking pursuant to a consent order entered into with the Office of the Comptroller of the Currency. For the reasons set forth below, we affirm the rulings of the district court.

I. FACTUAL BACKGROUND

[1] Defendant was acquitted on five counts of bank fraud and two counts of misapplication of bank funds.

Defendant was President and Chairman of the Board of Directors of the First National Bank of Tipton, Oklahoma ("Tipton Bank"). He was also a director of the First State Bank of Blanchard, Oklahoma ("Blanchard Bank") and the First National Bank of Hammon, Oklahoma ("Hammon Bank"). Defendant was also president of Executive Bank Services, a computer company that provided various bank management services for the Tipton, Blanchard and Hammon Banks.

Mark Hight was co-defendant in the criminal case. At the time of the offenses charged, Hight was a senior vice-president of the Farmer's National Bank in Cordell, Oklahoma, ("Farmers Bank"). Prior to trial, Hight entered into a plea agreement wherein he pled guilty to a charge of making a false statement and agreed to testify for the Government in the criminal case against defendant.

The evidence at trial established that defendant and Hight established a business partnership named JA-MAR Properties, Ltd. ("JA-MAR")[2]. The articles of partnership of JA-MAR were signed on February 17, 1983, showing defendant and Hight as general partners. Through JA-MAR, defendant and Hight bought low to moderate income residential properties in the Oklahoma City area for rental and investment.

The evidence at trial was that during the period immediately following JA-MAR' establishment, the partnership fared well financially. Rents from the properties were sufficient to service the debt on the properties and make necessary repairs. However, in the economic downturn of late 1986, JA-MAR ran into severe cash flow problems. JA-MAR's vacancy rate was

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[2] JA-MAR was short for the first name of defendant Jack B. Rackley and Mark Hight.

increasing while its rental income was falling. Defendant and Hight were forced to make some of the mortgage payments and repairs out of their own funds. By 1986, JA-MAR had incurred approximately $500,000 of secured and unsecured debt, for which defendant and Hight were both fully responsible.

In an effort to alleviate these financial pressures, defendant and Hight engaged in an arrangement to sell several pieces of property. Defendant and Hight approached Bruce Thompson, a local real estate investor who bought, renovated, and rented low and moderate income real estate properties in the Oklahoma City area. Thompson also served as a "work out specialist" for several area banks, including Farmers Bank. Thompson would buy foreclosed properties from the banks, with their funding and at their request, in order to remove the nonproductive properties from the bank's books. Thompson did not purchase all these properties himself. Instead, "investors" with good credit ratings took out the loans in their names. Thompson would pay these investors a $2500 incentive fee for each loan.[3] Thompson would then make all the payments on these loans until such time as the investment property had been repaired, rented and was producing sufficient income to service the debt.

In late fall, 1986, Hight approached Thompson regarding several troubled JA-MAR properties. Thompson found two potential investors for JA-MAR. Those investors were Thompson's attorney, Edward Allen Reed, and former real estate developer Rick Garrett. JA-MAR proceeded to sell multiple

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[3] The evidence presented at trial indicated that the $2500 fee paid to the investors was basically a payment for the use of the investor's credit rating in order to obtain the loan. Typically, the investors put no money of their own into the purchase of the properties.

properties to Reed and Garrett. The properties were financed primarily through banks in which defendant and Hight were employed. A series of loans were made by Farmers Bank, Hammon Bank, Blanchard Bank, Tipton Bank and the Oxford Bank of Oxford, Kansas.[4] At trial, the Government alleged that the vast majority of these loans were made with either defendant or Hight acting as the loan officer at the bank. The Government alleged that various false statements were made in order to obtain the loans, including lack of disclosure of defendant's and Hight's financial interest in JA-MAR, signed settlement statements representing that purchasers had made earnest money deposits which in fact had not been made, and preparation of misleading credit information regarding the purchasers. The Government also alleged that loan documents were structured to represent that the investors were paying 90% of the appraised value, when in fact the banks were financing 100% of the purchase price.

In addition to the counts involving improper loans to finance purchases of JA-MAR properties, counts 12 and 13 of the Indictment related to a loan made by the Tipton Bank for Reed's purchase of an eight-unit apartment building owned by Thompson. Defendant acted as the loan officer on the deal, providing the financing through a loan for the full amount made by the Tipton Bank. The Government alleges that some of the proceeds from this loan were used to pay commissions to Reed and Garrett for the other JA-MAR loans and to pay for repairs to the JA-MAR properties.

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[4] Neither defendant or Hight were employed by Oxford Bank. However, defendant had known the president and chairman of the bank for several years. JA-MAR had several outstanding loans at the bank. Proceeds of the sale of the property through the Oxford Bank loan were used to pay down JA-MAR's indebtedness to the bank.

II. Sufficiency of the Evidence

Evidence is sufficient to support a criminal conviction if, viewing all the evidence, both direct and circumstantial, in the light most favorable to the government, a reasonable trier of fact could find the essential elements of a crime beyond a reasonable doubt. United States v. Drake, 932 F.2d 861, 863 (10th Cir. 1991); United States v. Culpepper, 834 F.2d 879, 881 (10th Cir. 1987).

In order to convict the defendant of bank fraud under 18 U.S.C. §1344, the government was required to prove: (1) that the defendant knowingly executed or attempted to execute a scheme (i) to defraud, or (ii) to obtain property by means of false or fraudulent pretenses, representations or promises;[5] (2) that defendant did so with the intent to defraud; and (3) that the financial institution was then insured by the Federal Deposit Insurance Corporation. See 18 U.S.C. §1344; United States v. Bonnett, 877 F.2d 1450 (10th Cir. 1989).

In order to convict the defendant of willful misapplication of bank funds under 18 U.S.C. §656, the government was required to prove: (1) that defendant was a bank officer or director; (2) that each bank was a national or federally insured bank; (3) that the

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[5] The district court instructed the jury in the disjunctive; that is, the jury was instructed that to find defendant guilty it had to find the defendant knowingly executed or attempted to execute a scheme (1) to defraud, or (2) to obtain property by means of false or fraudulent pretenses, misrepresentations, or promises. We have previously held that this disjunctive instruction properly tracks the language of the statute and accurately states the necessary elements required to be found by a jury under the alternate prongs of 18 U.S.C. §1344. United States v. Bonnett, 877 F.2d 1450 (10th Cir. 1989).

defendant willfully misapplied bank funds; and (4) that the defendant acted with intent to injure or defraud each bank. See 18 U.S.C. §656; United States v. Harenberg, 732 F.2d 1507, 1511 (10th Cir. 1984).

Defendant argues that there was insufficient evidence to convict him of bank fraud and misapplication of funds due to the fact that the owner of the Tipton, Hammon and Blanchard banks, John Hudson, who was also a director of each bank, was knowledgeable of the circumstances of the loans. Defendant points to trial testimony of Larry Baresal, who was a director of the Hammon and Tipton Banks and also did legal work for the banks.s Baresal testified that both he and Hudson knew and were aware of defendant's interest in JA-MAR and were aware of the circumstances of the challenged loans.

Defendant frames his argument as a lack of sufficiency of the evidence to convict him of the offenses. However, defendant does not challenge the evidence as such, rather, he makes a legal argument that he cannot be guilty of the offenses charged because Hudson, the owner and a director of the banks, and Baresal, a director of the Tipton and Hammon banks and sometime lawyer for the Hudson-owned banks, were aware of the circumstances of the JA-MAR loans. The court finds such an argument to be an erroneous statement of the law. Hudson's and Baresal's knowledge or lack of knowledge of the circumstances of the loans is simply not determinative of the charges against defendant of bank fraud and misapplication of funds.

Defendant confuses the notion of defrauding a federally insured bank with the idea of defrauding its owner or directors. It is the financial institution itself--not its directors or agent--that is the victim of the fraud and statute proscribes. See United States v. Saks, 964 F.2d 1514, 1518 (5th Cir. 1992); United States v.

Blackmon, 839 F.2d 900, 904-06 (2nd Cir. 1988); S. Rep. No. 225, 98th Cong., 2nd Sess. 377 (1983) reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3517 (§1344 was "designed to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled, or insured."). Section 1344 was intended to reach a wide range of fraudulent activity that undermines the integrity of the federal banking system. Saks, 964 F.2d at 1519.

Thus, even if Hudson knew the true nature of the loan transactions, the institutions could nevertheless be defrauded. A number of courts have concluded that if a borrower obtains funds at the insistence of and for the benefit of the bank officer, without disclosing the officer's interest of the loan documents, thereby flouting banking rules and regulations designed to protect the financial integrity of the bank, a jury can conclude that both borrower and officer acted with intent to defraud the bank. See United States v. Saks, 964 F.2d 1514, 1519 (5th Cir. 1992); United States v. Castiglia, 894 F.2d 533, 536-38 (2nd Cir. 1990); United States v. Walker, 871 F.2d 1298, 1306-07 (6th Cir. 1989); United States v. Shively, 715 F.2d 260 (7th Cir. 1983).[6] We agree with this reasoning.

Even assuming that Hudson's awareness was relevant to the question of whether defendant intended to defraud the banks, the

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[6] The Saks case involved a violation of 18 U.S.C. §1344. The Saks opinion noted that these reported cases "for the most part involve misapplication of bank funds under 18 U.S.C. §656." Saks, 964 F.2d at 1519. However, the Saks court noted that both §656 and §1344 require proof that the defendant intended to defraud or injure a bank, which is the element at issue here. Thus, the same argument applies to both statutes under which defendant was convicted.

evidence at trial showed that Hudson had resigned from the Tipton and Hammon Banks in August, 1986, months before the first loan charged in the indictment. Thus, by the time the loans were presented, Hudson was no longer with the banks and had no authority to authorize or approve loans for those banks.

Defendant's material non-disclosure in the formal loan process was clearly shown by the government at trial. Evidence was presented that defendant's interest in the particular loans was not included in the loan files, mentioned to the board members, or discussed at board or loan committee meetings. Moreover, there was specific testimony at trial that the banks and the escrow agents would not have approved the loans or authorized the payments at closing had the loan documents accurately reflected defendant's interest in the loans.

The court finds, after a thorough review of the proceedings below, that there was substantial evidence that defendant defrauded the banks and misapplied bank funds, and, therefore, the evidence was sufficient to sustain the conviction.

III. Admissibility of Evidence Regarding Defendant's Removal From Banking By the Comptroller of the Currency

Defendant contends that the government was wrongfully permitted to question Larry Baresal, who was called as a defense witness, and defendant himself regarding civil actions brought against them by the Office of the Comptroller of the Currency ("OCC"). In settlement of an administrative action brought by the OCC, Baresal, defendant and Hudson had all entered into a consent order imposing a lifetime ban on banking. Pursuant to the consent order, the three individuals could not re-enter banking without the OCC's prior consent.

Defendant brings his argument under two different theories. The first is that the evidence was improper other bad acts evidence which should not have admitted under Fed. R. Evid. 404(b). The second is that it should have been excluded under United States v. Christo, 614 F.2d 486 (5th Cir. 1980). We do not agree on either score.

In general, the trial court has broad discretion in ruling on evidentiary matters. United States v. Drake, 932 F.2d 861, 866 (10th Cir. 1991); United States v. Alexander, 849 F.2d 1293, 1301 (10th Cir. 1988). We may not reverse the trial court's evidentiary rulings "in the absence of an abuse of discretion." Id. (citations omitted). We find that the government's questioning regarding the OCC ban during its cross-examination of Baresal and defendant was within the bounds of relevant cross-examination under Fed. R. Evid. 611(b) to impeach the witnesses' direct testimony. The district court did not abuse its discretion in allowing the questioning by the government on cross-examination regarding the OCC ban. It was neither Rule 404(b) evidence nor subject to exclusion under Christo.

On direct examination, both Baresal and defendant testified that the loan procedures they followed were responsible and in compliance with, or at least not contrary to, federal regulations, that John Hudson, owner of the banks, had approved the transactions with full knowledge of defendant's interest; that defendant had complied with federal regulations by disclosing his interests; and that they had made the loans for sound financial reasons and had acted in the bank's best interests. Defendant also testified as to his former experience as a bank examiner and professed to be familiar with banking regulations. In short, both Baresal and defendant painted a picture in their direct testimony that they exercised great care in making the loans, that they had expertise in banking rules and regulations, and that they followed

proper banking procedures and regulations, as was their custom.

Given this line of direct testimony, the court finds that it was proper under Fed. R. Evid. 611(b) for the government to inquire as to the OCC ban on cross-examination for the purpose of attacking the credibility of the witnesses.[7] Because both witnesses in their direct testimony testified regarding their care and expertise in following banking rules and regulations, the fact that as a result of an administrative investigation both had consented to a lifetime ban from banking is probative as to the credibility of the witnesses' testimony.

Defendant argues strenuously that the evidence regarding the OCC ban was not properly admitted under Fed R. Evid. 404(b), and that no 404(b) limiting instruction was given (although he also candidly admits that none was requested). We find defendant's argument based on 404(b) standards to be incorrect because the government's cross-examination regarding the OCC ban was not 404(b) evidence. It went to the issue of the witnesses' credibility, and was properly admitted as impeachment under Fed. R. Evid. 611(b). Rule 404(b) deals with the handling of evidence of other crimes, wrongs or acts, making such inadmissible to prove character in order to show conformity therewith but allowing such for certain other limited purposes. The government did not offer the evidence for any of the purposes covered by Rule 404, proper or improper, but rather to impeach credibility. When matters are

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[7] Federal Rules of Evidence 611 (b) provides:

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

brought out in cross-examination for impeachment purposes, the appropriate evidentiary rule if 611(b). See United States v. Smalley, 754 F.2d 944, 951 (11th Cir. 1985). Our review of the record indicates that the trial court properly admitted the evidence for that purpose.[8]

We find defendant's argument that the evidence regarding the OCC ban is not admissible based on the holding in United States v. Christo, 614 F.2d 486 (5th Cir. 1980) to be equally incorrect. In Christo, the court found reversible error in the confusion, persistent throughout the trial and in the court's instructions, between the defendant's civil regulatory violations and the felony charges of misapplication of bank funds for which defendant was on trial. In Christo, the district court had repeatedly linked the civil violations with the criminal charges so as to suggest that evidence of the regulatory violations could be used as a basis to convict on the criminal charges. Id. at 490-92.

Christo was later distinguished in United States v. Stefan, 784 F.2d 1093, 1098 (11th Cir. 1986). The Stefan court stated that:

> Christo forbids introducing evidence of civil banking violations solely

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[8] The defendant did not raise on appeal an argument that this evidence, even if properly within the ambit of cross-examination under Rule 611(b), should have been excluded under Fed. R. Evid. 403 because the danger of unfair prejudice substantially outweighed its probative value. He did make passing reference to the trial court of his concern about the "prejudicial effect" outweighing the "probative value," without reference to Rule 403 or to the significant modifiers "substantially" and "unfair" which guide the court's discretion. Without expressly balancing probative value and prejudicial effect according to the test set out in the rule, the trial court declined to exclude the evidence on this basis. We find no error in the trial court's conclusion, in any event.

> for the purpose of proving criminal misapplication; however, it does not hold that such evidence can never be introduced in a criminal misapplication case.
> ...If the evidence of civil violations is introduced for purposes other than to show criminal misapplication and the evidence is not presented in such a way that the jury's attention is focused on the civil violations rather than the criminal ones, there is no error.

Id.

In this case, the government's cross-examination of each witness was limited to the matter of whether, in fact, the witness had been banned from banking pursuant to an agreement with the OCC. There was no reference to any specific regulation that was violated. There was no mention by the court or the government that the civil regulatory violations or OCC ban should play any part in the jury's deliberations, nor was any jury instruction given to this effect. The OCC ban was touched on only marginally in the government's cross-examination not to establish that defendant had committed criminal violations, as in Christo, but rather to impeach the testimony of defendant and Baresal regarding their expertise in banking operations and their professed adherence to sound banking principles.

IV. Conclusion

For the reasons stated above, the holding of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 91-6343
	)	
JACK B. RACKLEY,	)	
	)	
Defendant-Appellant.	)	

ORDER
FILED MARCH 31, 1993

Before BALDOCK, EBEL, Circuit Judges, LUNGSTRUM, District Judge*.

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*The Honorable John W. Lungstrum of the United States District Court for the District of Kansas, sitting by designation.

Appellant's submission of an untimely petition for rehearing is construed as a motion for leave to file it out of time which is granted. The petition for rehearing is denied on the merits.

Entered for the Court
ROBERT L. HOECKER, CLERK
By: Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	) **Case No. CR-91-73 W**
	)
vs.	) **INDICTMENT**
	)
JACK B. RACKLEY,	) **Bank Fraud**
MARK E. HIGHT,	) **[18 U.S.C.§1344]**
	) **Misapplication**
	) **[18 U.S.C.§656]**
	) **Aiding and Abetting**
Defendants.)	**[18 U.S.C.§2]**

THE GRAND JURY CHARGES:

COUNT I

[18 U.S.C. §1344 & §92; BANK FRAUD]

INTRODUCTION

ALL TIMES MATERIAL TO THIS INDICTMENT:

1. The Federal Deposit Insurance Corporation (FDIC) was an agency of the United States established to protect depositors by insuring deposits in insured banking institutions in amounts up to $100,000 per account.

2. The First National Bank, Tipton, Oklahoma, (Tipton Bank), was a national banking association, the deposits of

which were insured by the FDIC.

3. The First National Bank, Hammon, Oklahoma (Hammon Bank), was a national banking association, the deposits of which were insured by the FDIC.

4. The Oxford Bank, Oxford, Kansas (Oxford Bank), was a state chartered banking association, the deposits of which were insured by the FDIC.

5. The First State Bank, Blanchard, Oklahoma (Blanchard Bank), was a state chartered banking association, the deposits of which were insured by the FDIC.

6. Farmers National Bank, Cordell, Oklahoma, (Farmers Bank), was a national banking association, the deposits of which were insured by the FDIC.

7. JACK B. RACKLEY was the President and Chairman of the Board of Directors of Tipton Bank and a member of the Board of Directors of Hammon Bank and Blanchard Bank. JACK B. RACKLEY was also president of Executive Bank Management Services, Inc., a bank consulting company.

8. MARK E. HIGHT was an executive vice-president and a member of the Officers' Loan Committee of Farmers Bank. MARK E. HIGHT was also self-employed as a bank consultant.

9. JA-MAR Properties, Ltd. (JA-MAR) was a partnership owned by JACK B. RACKLEY and MARK E. HIGHT which was formed to own rental real estate located in the Oklahoma City area.

10. Edward A. Reed was an attorney licensed to practice law by the State of Oklahoma. He purchased real estate in the Oklahoma City area using the business name, Edward A. Reed Interests, Ltd.

11. Bruce T. Thompson was a real estate investor engaged in the purchase of real estate in the Oklahoma City area through his corporation, Bruce Thompson Industries, Inc.

12. Rich Garrett was a real estate builder who purchased real estate in the Oklahoma City area.

13. American Guaranty and Title Company, Oklahoma City, Oklahoma (American Guaranty), was a company which provided real estate title and settlement services.

14. State Title Company, Inc., Oklahoma City, Oklahoma (State Title) was a company which provided real estate title and settlement services.

THE SCHEME AND ARTIFICE TO DEFRAUD AND TO OBTAIN MONEY AND FUNDS

15. Beginning in or about December 1986, through in or about March 1987, within the Western District of Oklahoma, the defendants,

JACK B. RACKLEY

and

MARK E. HIGHT

knowingly devised and intended to devise a scheme and artifice (1) to defraud Tipton Bank, Hammon Bank, Farmers Bank, Blanchard Bank, and Oxford Bank, all of which were federally insured financial institutions and, (2) to obtain the moneys and funds owned by and under the custody and control of Tipton Bank, Hammon Bank, Farmers Bank, Blanchard Bank, and Oxford Bank, by means of false and fraudulent pretenses, representations, and promises.

THE MANNER AND MEANS OF THE SCHEME AND ARTIFICE

It was a part of the scheme and artifice that:

16. Beginning in or about December 1986, through in or about March 1987, JACK B. RACKLEY and MARK E. HIGHT would sell rental real estate owned by JACK B. RACKLEY and/or JA-MAR because they were unable to make monthly payments of principal and interest to the mortgagees on a timely basis.

17. In or about December 1986, JACK B. RACKLEY

and MARK E. HIGHT would request that Bruce Thompson assist them in recruiting buyers to purchase defendant's real estate.

18. JACK B. RACKLEY and MARK E. HIGHT would solicit buyers to purchase the defendants' real estate by promising to pay the buyers a fee as an inducement and, by promising to secure bank financing for the real estate purchases without the buyers personally applying for a loan.

19. JACK B. RACKLEY and MARK E. HIGHT would each use their position or influence, as bank officer or director, or both, to fraudulently cause Tipton Bank, Hammon Bank, Blanchard Bank, Farmers Bank, and Oxford Bank to make six (6) loans totaling in excess of $400,000 to buyers of defendants' real estate.

20. JACK B. RACKLEY and MARK E. HIGHT would recommend to the banks that loans for the purchase of defendants' real estate be approved and funded when, the defendants had made and caused to be made false entries on bank loan documents and real estate closing documents; had concealed from loan officers and the banks material facts about the loan transactions; and, had made no investigation of the buyers' creditworthiness and ability to repay the loans.

21. JACK B. RACKLEY and MARK E HIGHT would fraudulently approve and fund, and cause to be fraudulently approved and funded a Tipton Bank loan to Edward A. Reed Interests, Ltd.

22. JACK B. RACKLEY and MARK E. HIGHT would fraudulently approve and fund, and cause to be fraudulently approved and funded a Tipton Bank loan to Edward A. Reed Interests, Ltd.

23. JACK B. RACKLEY and MARK E. HIGHT would cause real estate closing documents and bank loan documents to falsely reflect the nature of the loan transactions.

24. JACK B. RACKLEY and MARK E. HIGHT would deceitfully and fraudulently conceal from the banks the

liabilities and indebtedness of the buyers of defendants real estate.

25. JACK B. RACKLEY and MARK E. HIGHT would deceitfully and fraudulently conceal from the banks that the buyers had been paid or would be paid a fee as an inducement to purchase real estate from the defendants.

26. JACK B. RACKLEY and MARK E. HIGHT would make and cause to be made false entries in bank loan documents regarding the defendants' use of loan proceeds; and would conceal from the banks the fact that loan proceeds would be applied directly to the use and benefit of the defendants and, that loan proceeds would be used to pay the buyers a fee as an inducement for purchasing defendants' real estate.

27. JACK B. RACKLEY and MARK E. HIGHT would deceitfully and fraudulently conceal from Tipton Bank that the defendants would receive $42,500.00 in loan proceeds from the tipton Bank loan to Edward A. Reed Interests, Ltd.

28. JACK B. RACKLEY and MARK E. HIGHT would sign and cause to be signed real estate sales contracts on which the sales prices of the defendants' real estate had been falsely and fraudulently recorded.

29. JACK B. RACKLEY and MARK E. HIGHT would cause real estate closing documents to falsely reflect that the buyers had made and earnest money deposit or down payment on the properties when, in truth and fact, the buyers had made no cash investment in the real estate.

30. JACK B. RACKLEY and MARK E. HIGHT would cause the real estate settlement and closing statements to be withheld from the banks.

EXECUTION OF THE SCHEME AND ARTIFICE

31. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendants,

JACK B. RACKLEY

and

MARK E. HIGHT,

aided and abetted by one another, knowingly executed and attempted to execute the aforesaid scheme and artifice, in that, JACK B. RACKLEY and MARK E. HIGHT caused American Guaranty and Title Company to disburse Farmers Bank loan proceeds in the amount of $94,500.00 for the purchase of real estate owned by JA-MAR, located at 1716 N.W. 17th Street, Oklahoma City, Oklahoma.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 2

[18 U.S.C. §656 & §52; MISAPPLICATION]

1. The allegations contained in paragraph 1 through 14 of Count 1 of this Indictment are reallege and incorporated by reference herein.

2. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendant,

MARK E. HIGHT,

being an officer, that is, executive vice-president of Farmers Bank, and aided and abetted by the defendant,

JACK B. RACKLEY,

with the intent to injure and defraud Farmers Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, did willfully and knowingly misapply and cause to be misapplied monies and funds belonging to Farmers Bank and entrusted to the custody and care of said bank, by deceitfully causing Farmers Bank to disburse loan proceeds in the amount of $94,500.00, in which the defendants had a financial interest, to American Guaranty.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 3

[18 U.S.C. §1344 AND §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendants,

JACK B. RACKLEY
and
MARK E. HIGHT

aided and abetted by one another, knowingly executed and attempted to execute the aforesaid scheme and artifice, in that, JACK B. RACKLEY and MARK E. HIGHT, in connection with a Farmers Bank loan, caused an entry to be recorded on a closing statement that Edward A. Reed Interests, Ltd., had made an earnest money deposit of $10,500.00 for the purchase of 1716 N.W. 17th Street, Oklahoma City, Oklahoma, when in truth and fact, as the defendants well knew, an earnest money deposit had not been made.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 4

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

aided and abetted by the defendant,

MARK E. HIGHT,

knowingly executed and attempted to execute the aforesaid scheme and artifice, in that, JACK B. RACKLEY and MARK E. HIGHT caused to be disbursed Hammon Bank loan proceeds,s cashier's check number 4610, in the amount of $33,300.00, payable to State Title, for the purchase of real estate owned by JACK B. RACKLEY, located at 1011 N.W. 89th Street, Oklahoma City, Oklahoma.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 5

[18 U.S.C. §656 and §2; MISAPPLICATION]

1. The allegations contained in paragraphs 1 through 14 of Count 1 of this Indictment are reallege and incorporated by reference herein.

2. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

being a director of Hammon Bank, and aided and abetted by the defendant,

MARK E. HIGHT

with the intent to injure and defraud Hammon Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, did willfully and knowingly misapply and cause to be misapplied monies and funds belonging to Hammon Bank and entrusted to the custody and care of said bank, by deceitfully causing Hammon Bank to make a loan in the amount of $33,300.00 to Edward A. Reed Interests, Ltd., in which the defendants had a financial interest.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 6

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraph 1 through 30 of County 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

aided and abetted by the defendant,

MARK E. HIGHT,

knowingly executed and attempted to execute the aforesaid scheme and artifice, in connection with a Hammon Bank loan, by signing and causing to be signed a settlement statement which represented that Edward A. Reed Interests, Ltd., had made an earnest money deposit of $3,700.00 for the purchase of 1011 N.W. 89th Street, Oklahoma City, Oklahoma, when in truth and fact, as the defendants well knew, an earnest money deposit had not been made.

All violations of Title 18, United States Code, Sections 1344 and 2.

COUNT 7

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of County 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT January 8, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

aided and abetted by the defendant,

MARK E. HIGHT,

knowingly executed and attempted to execute the aforesaid scheme and artifice, in that, JACK B. RACKLEY and MARK E. HIGHT caused to be disbursed Blanchard Bank loan proceeds, cashier's check number 123572, in the amount of $115,425.00, payable to State Title Insurance Company, for the purchase of property owned by JACK B. RACKLEY, located at 1601-1601 1/2 N.W. 32nd Street, 1605-1607 N.W. 32nd Street, and 3311 North Blackwelder, Oklahoma City, Oklahoma.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 8

[18 U.S.C. §656 and §2; MISAPPLICATION]

1. The allegations contained in paragraphs 1 through 14 of Count 1 of this Indictment are reallege and incorporated by reference herein.

2. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

being a director of Blanchard Bank, and aided and abetted by the defendant,

MARK E. HIGHT

with the intent to injure and defraud Blanchard Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, did willfully and knowingly misapply and cause to be misapplied monies and funds belonging to Blanchard Bank and entrusted to the custody and care of said bank, by deceitfully causing Blanchard Bank to make a loan in the amount of $115,425.00 to Edward A. Reed Interests, Ltd., in which the defendants had a financial interest.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 9

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT January 8, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

aided and abetted by the defendant,

MARK E. HIGHT,

knowingly executed and attempted to execute the aforesaid scheme and artifice, in connection with a Blanchard Bank loan, by signing and causing to be signed a settlement statement which represented that Edward A. Reed Interests, Ltd., had made an earnest money deposit of $12,825.00 for the purchase of real estate owned by JACK B. RACKLEY, located at 1601-1601 1/2 N.W. 32nd Street, 1605-1607 N.W. 32nd Street, and 3311 North Blackwelder, Oklahoma City, Oklahoma, when in truth and fact, as the defendants well knew, an earnest money deposit had not been made.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 10

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT January 15, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

and

MARK E. HIGHT

aided and abetted by one another, knowingly executed and attempted to execute the aforesaid scheme and artifice, in that JACK B. RACKLEY and MARK E. HIGHT caused American Guaranty to disburse Oxford Bank loan proceeds in the amount of $27.000.00 for the purchase of real estate owned by JA-MAR, located at 806 West Hill, Oklahoma City, Oklahoma.

All in violation of Title 18, United States Code, Sections 1344 and 2

COUNT 11

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT January 14, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

and

MARK E. HIGHT

aided and abetted by one another, knowingly executed and attempted to execute the aforesaid scheme and artifice, in that JACK B. RACKLEY and MARK E. HIGHT, in connection with an Oxford Bank loan, each signed a closing statement which represented that Edward A. Reed Interests, Ltd., had made an earnest money deposit of $3,000.00 for the purchase of real estate owned by JA-MAR, located at 806 West Hill, Oklahoma City, Oklahoma, when in truth and fact, as the defendants well knew, an earnest money deposit had not been made.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 12

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

aided and abetted by the defendant,

MARK E. HIGHT,

knowingly executed and attempted to execute the aforesaid scheme and artifice, in that JACK B. RACKLEY and MARK E. HIGHT caused to be disbursed Tipton Bank loan proceeds, cashier's check number 6716, in the amount of $90,000.00, payable to State Title Company, Inc., for the purchase of real estate owned by Bruce Thompson Industries, Inc., located at 2820-2822 North Robinson, Oklahoma City, Oklahoma, by Edward A. Reed Interests, Ltd.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 13

[18 U.S.C. §656 and §2; MISAPPLICATION]

1. The allegations contained in paragraphs 1 through 14 of Count 1 of this Indictment are reallege and incorporated by reference herein.

2. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

being a officer, that is, president of Tipton Bank, and aided and abetted by the defendant,

MARK E. HIGHT

with the intent to injure and defraud Tipton Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, did willfully and knowingly misapply and cause to be misapplied monies and funds belonging to Tipton Bank and entrusted to the custody and care of said bank, by deceitfully causing Tipton Bank to make a loan in the amount of $90,000.00 to Edward A. Reed Interests, Ltd., in which the defendants had a financial interest.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 14

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT March 23, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

and

MARK E. HIGHT

aided and abetted by one another, knowingly executed and attempted to execute the aforesaid scheme and artifice, in that JACK B. RACKLEY and MARK E. HIGHT caused American Guaranty and Title Company to disburse Tipton Bank loan proceeds, in the amount of $64,800.00, for the purchase of real estate owned by JA-MAR, located at 1312-1314 N.W. 12th Street, Oklahoma City, Oklahoma.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 15

[18 U.S.C. §656 and §2; MISAPPLICATION]

1. The allegations contained in paragraphs 1 through 14 of Count 1 of this Indictment are reallege and incorporated by reference herein.

2. ON OR ABOUT March 6, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

being a officer, that is, president of Tipton Bank, and aided and abetted by the defendant,

MARK E. HIGHT

with the intent to injure and defraud Tipton Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, did willfully and knowingly misapply and cause to be misapplied monies and funds belonging to Tipton Bank and entrusted to the custody and care of said bank, by deceitfully causing Tipton Bank to make a loan in the amount of $64,800.00 to Rick Garrett, in which the defendants had a financial interest.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 16

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT March 6, 1987, in the Western District of Oklahoma, the defendant,

JACK B. RACKLEY,

and

MARK E. HIGHT

aided and abetted by one another, knowingly executed and attempted to execute the aforesaid scheme and artifice, in that JACK B. RACKLEY and MARK E. HIGHT, in connection with a Tipton Bank loan, each signed a closing statement which represented that Rick Garrett had made an earnest money deposit of $7,200.00 for the purchase of 1312-1314 N.W. 12th Street, Oklahoma City, Oklahoma, when in truth and fact, as the defendants well knew, an earnest money deposit had not been made.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 17

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT January 9, 1987, in the Western District of Oklahoma, the defendant,

MARK E. HIGHT

aided and abetted by the defendant,

JACK B. RACKLEY

knowingly executed and attempted to execute the aforesaid scheme and artifice, by paying and causing to be paid to Edward A. Reed the sum of $12,500.00 from the Farmers Bank loan proceeds, check number 1261, drawn on a MARK E. HIGHT checking account at Farmers Bank.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 18

[18 U.S.C. §1344 and §2; BANK FRAUD]

1. The allegations contained in paragraphs 1 through 30 of Count 1 of this Indictment are reallege and incorporated by reference herein as describing the scheme and artifice of JACK B. RACKLEY and MARK E. HIGHT.

2. ON OR ABOUT March 9, 1987, in the Western District of Oklahoma, the defendant,

MARK E. HIGHT,

aided and abetted by the defendant,

JACK B. RACKLEY,

knowingly executed and attempted to execute the aforesaid scheme and artifice, by paying and causing to be paid to Rick Garrett the sum of $8,333.00, check number 1048, drawn on a MARK E. HIGHT checking account at Farmers Bank.

All in violation of Title 18, United States Code, Sections 1344 and 2.

A TRUE BILL

_____

GRAND JURY FOREMAN

Timothy D. Leonard
United States Attorney
Western District of Oklahoma

Wayne P. Williams
Trial Attorney, Fraud Section

Kevin G. Matthews
Trial Attorney, Fraud Section

Criminal Division
U.S. Department of Justice
P.O. Box 28188
Central Station
Washington, D.C. 20038
(202) 514-0880

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA

v. JUDGMENT IN A CRIMINAL CASE

JACK BUTLER RACKLEY
3100 Windsor Boulevard
Oklahoma City, Oklahoma Case Number: CR-91-73-W
(Name & address of Defendant)

C. Merle Gile
Defendant's Attorney

THE DEFENDANT ENTERED A PLEA OF:

___ guilty ___ nolo contendere as to count(s)_____, and
_x_ not guilty as to count(s) one through eighteen of Indictment on April 18, 1991.

THERE WAS A:
___ finding _x_ verdict of guilty as to count(s)
3,4,5,6,9,11,12,13,14,15 & 16.

THERE WAS A:
___ finding _x_ verdict of not guilty as to count(s)
1,2,7,8,10,17 & 18.
___ judgment of acquittal as to count(s)
The defendant is acquitted and discharged as to this/these counts.

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:
Violation of Title 18 U.S.C. Section 656 and 2. Misapplication of bank funds. Violation of Title 18 U.S.C. Section 1344. Bank Fraud.

IT IS THE JUDGMENT OF THIS COURT THAT:

The defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of 2 1/2 years. This term consists of 2 1/2 years o each of Counts 5, 13 and 15, and 2 1/2 years on each of Counts 3, 4, 6, 9, 11, 12, 14 & 16, all such terms to run concurrently.

The execution of sentence is stayed until 12:00 noon on Thursday, January 2, 1992, at which time the defendant shall report to the designated place of confinement.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any,to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes

in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the condition of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 per count pursuant to Title 18 U.S.C. Section 3013 for count(s) 3, 4, 5, 6, 9, 11, 12, 13, 14, 15 & 16 for a total of $550.00 due immediately.

IT IS FURTHER ORDERED that counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

___ The Court orders commitment to the custody of the Attorney General and recommends: El Reno Camp, El Reno, Oklahoma.

October 2, 1991
Date of Imposition of Sentence

Signature of Judicial Officer
LEE R. WEST, U.S. DISTRICT JUDGE
Name and Title of Judicial Officer
October 2, 1991

RETURN

I have executed this Judgment as follows:

Defendant delivered on ____ to _____ at _____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

United States Marshal

By:_____
Deputy Marshal